

MEDIATOR STRATEGIES WHEN WORKING WITH CHILD-CUSTODY  
AND DIVORCE CASES INVOLVING INTIMATE  
PARTNER VIOLENCE

by

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A THESIS

Presented to the Conflict and Dispute Resolution Program  
and the Graduate School of the University of Oregon  
in partial fulfillment of the requirements  
for the degree of  
Master of Science

June 2014

THESIS APPROVAL PAGE

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Title: Mediator Strategies When Working With Child-Custody and Divorce Cases  
Involving Intimate Partner Violence

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## THESIS ABSTRACT

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June 2014

Title: Mediator Strategies When Working With Child-Custody and Divorce Cases Involving Intimate Partner Violence

Many family mediators encounter intimate partner violence (IPV) during the course of child-custody and divorce mediation. By interviewing family mediators in Oregon I have established concrete strategies that mediators use when working with parties who may have a history of IPV. These strategies may be structural, such as building design and intake procedures, or they may be verbal interventions employed during the course of mediation. Mediators employed a wide variety of strategies based on their experience, situations, and intuition. Some strategies, like the use of shuttle mediation, were used by all the mediators I contacted. Other strategies, such as naming problematic behavior, were limited to only a few of the mediators. All the participating family mediators were aware of the possibility of IPV and consciously took measures to limit its influence on the mediation process when it existed.

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## ACKNOWLEDGMENTS

I would like to thank several people, without whom, completing this thesis would have been impossible: My advisor, Nathaline, for invaluable advice, support, and guidance. Tim, for lending his expertise and experience as my committee member. Anna and Kata in the CRES office for knowing the answers to all of my questions. My family, friends, and loved ones for all the support, advice, proof-reading, distractions, and understanding they could provide.

For my parents, who never wavered in their support, and Elizabeth, who would not let me be narrow-minded.

## TABLE OF CONTENTS

Chapter		Page
I.	INTRODUCTION .....	1
	The Purpose of this Research .....	1
	Overview and Background .....	3
	Notes on Terminology .....	5
II.	LITERATURE REVIEW .....	9
	Intimate Partner Violence: Definitions and General Information.....	9
	The Appropriateness of Mediation .....	11
	The Detection of Intimate Partner Violence .....	14
	The Effect of Intimate Partner Violence on Mediation Agreements .....	16
	Mediator Strategies .....	18
	Oregon Statutes Concerning Family Mediation .....	21
III.	METHODOLOGY .....	24
IV.	RESULTS .....	26
	Demographic Information.....	26
	General Philosophies .....	28
	Structural Components.....	30
	The Physical Setting.....	30
	Meeting Structure .....	31



Chapter	Page
Safety Measures .....	36
Prior to Mediation .....	40
Screening .....	40
Providing Information and Referrals.....	45
Meeting Separately .....	48
Awareness of IPV Dynamics .....	49
Advocates and Support Persons .....	50
Deciding Not to Mediate .....	52
During Mediation.....	56
Ground Rules.....	56
Caucusing .....	58
Separating Clients .....	60
Verbal Interventions .....	61
Ending Mediation .....	69
 V.    DISCUSSION AND CONCLUSION .....	 73
 APPENDICES	
A. QUESTIONNAIRE .....	75
B. INTERVIEW QUESTIONS .....	80
C. BIOGRAPHICAL INFORMATION OF PARTICIPANTS .....	82
REFERENCES CITED.....	83

# CHAPTER I

## INTRODUCTION

### **The Purpose of this Research**

Mediation trainings and programs can train prospective mediators about the theories and philosophies of mediation. They can assign role plays and papers and provide any number of workshops, but once classes are over the new mediators enter their specific careers and find themselves in situations they aren't necessarily prepared for. When starting a new career, a person can almost never be expected to know everything on the first day. Law students have told me that they don't start learning how to be a lawyer until their first day on the job, despite three years of law school. Training is broad. Jobs are specific. A person can only be so prepared for something they have never done. The same applies to mediation.

About a month into my internship with a court-connected domestic relations mediation program I was mediating in a supporting role with a very experienced mediator. I was more or less in charge of opening the mediation with an individual session with each of the participants. One afternoon I read an intake form and the box for domestic violence (DV) was firmly checked by the mother. The other mediator and I spoke with the father first. The father was in good spirits and gave no indication that intimate partner violence may have led to his estrangement from his family. We next spoke with the mother. She seemed frightened, but resolute. She was very clear with us about what had taken place from her point of view. While it was clear from her perspective that the relationship had been a traumatic experience, she was willing to talk to the father.

I had read the varying opinions about mediating with parties who have a history of intimate partner violence (IPV). I knew that some people supported mediating in these situations and some were opposed. Suddenly that debate mattered very little to me because sitting in front of me was a tearful mother who was clearly struggling with the prospect of mediating in the same room as the father, though she was resolute in her choice to do so. I was out of my depth and I knew it. Thankfully, I was not alone as a mediator. My experienced co-mediator took the reins and skillfully navigated a difficult session.

There were quite a few times when I felt unprepared in a mediation session, but my inexperience with IPV really struck me as potentially harmful for the participants involved. If I fail under normal circumstances I might be perceived as a poor mediator, or the parents might have to settle their case with a judge. When IPV is involved the threat of real, immediate violence may exist. Handling these sessions is tense and nerve-wracking for a new mediator.

I believe that any mediator entering the field of family mediation should have an opportunity to work under the supervision of an experienced mediator when working with parties who have experienced IPV. Unfortunately, this might not always be the case. While the State of Oregon requires twenty cases and one hundred hours of participation in mediation before solo-mediating county-mandated cases, this does not guarantee that IPV will emerge in one of these cases. Furthermore, this standard for family mediators does not hold across all states and jurisdictions.

My question is this: how can mediators serve survivors of abuse in a way that is physically and psychologically safe, as well as effective? My goal here is to answer this

question by presenting the results of interviews and surveys with ten domestic relations mediators in Oregon about their techniques, strategies, and precautions when working with clients who have experienced IPV. I cannot pretend that this will be a comprehensive guide to mediating cases involving intimate partner violence. I intend for it to be an addition to existing information on the subject. Furthermore, I do not intend to make claims about the effectiveness<sup>1</sup> of any particular strategies, only to present as clearly as possible the techniques that family mediators practice.

### **Overview and Background**

There are significant concerns about mediating with parties who have a history of IPV (Johnson, Saccuzzo, and Koen, 2005; Holtzworth, 2011; Field, 2004). Among these are concerns for victim safety, both physically and emotionally, fairness of process and outcome, balance of power, and the agency or self-determination of the participants. Many advocates for survivors of IPV oppose mediation because of its potential to re-victimize survivors and the lack of safeguards to prevent unfair or unsafe agreements. For many advocates, the system of abuse and control that characterizes abusive relationships prevents survivors from effectively participating in the mediation process. Attempting to mediate may also perpetuate and reinforce abusive behavior. Victim advocates also worry that the confidentiality of mediation will prevent abuse from coming to light and further remove IPV from the public consciousness (Field, 2004).

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<sup>1</sup> In general, mediators believed the techniques and strategies they used to be effective in the particular contexts in which they described them. An empirical evaluation of the effectiveness of mediator strategies, while an important topic for further research, is beyond the scope of this study.

All of these concerns are legitimate to one degree or another. There are certainly cases involving IPV in which mediation would be ineffective, unfair, or harmful. However, the alternatives to mediation are not always preferable. Proponents of mediation where IPV may exist argue that participating in mediation can be more empowering for survivors than the court process. Parties in a mediation are able to craft agreements to fit their particular situations and decide what is safe for them and their children. Furthermore, many mediators and mediation programs are using screening protocols for IPV and have developed safety procedures (Ballard, Holtzworth-Monroe, Applegate, and Beck, 2011).

Procedures and protocols vary from program to program. Each state enacted its own mediation statutes at different times and under different circumstances. For this reason, programs may differ significantly from state to state. This, along with the differences in mediation styles and models, has a major effect on the perception of mediation in some parts of the country. In California and some other states, for example, court-connected mediators give judges recommendations after a failed mediation (Johnson, Saccuzzo, and Koen, 2005). This is something that would be considered unethical in Oregon.

Right or wrong it is impossible to deny that, the way that many statutes are currently written, individuals who have experienced intimate partner violence might enter mediation. Of cases that include IPV, there is a wide variation in circumstances. The decision to use mediation may be voluntary or mandated. The level of violence and abuse may vary widely from case to case. It could be physical, sexual, or psychological. It

could have happened ten years ago, or ten days ago. Whatever the situation, mediators mediate these cases.

A significant number of mediation programs have acknowledged that IPV in mediation may be a factor in some number of their cases and have taken appropriate steps to account for this (Ballard, Holtzworth-Munroe, Applegate, and Beck, 2011). Many family mediators have training related to domestic violence (Ballard, Holtzworth-Munroe, Applegate, and Beck, 2011). Unfortunately, as with most things, training is not standard across all states and jurisdictions. Even in master's programs such as the one I attended, levels of training in mediation and domestic violence are unique to every mediator, and gaining a firm grasp on the ways mediators work with parties who have a history of intimate partner violence is not easy.

In the following pages, I will review the practices that are common in the literature. Then I will analyze the responses of ten Oregon mediators with regard to their own personal strategies when working with parties who have experienced IPV. I shall record the structural elements of their practice as well as their particular reactions and interventions, sometimes called micro skills. It is my hope that this research will contribute to the level of knowledge of how the presence of intimate partner violence is addressed in the field of mediation.

### **Notes on Terminology**

This paper contains a number of terms that have been defined in multiple ways in research and the media. It also uses some terminology with different meaning than is typical in colloquial use. For the purposes of this paper I offer the following:

**Mediation:** For the purposes of this paper, mediation refers to a process in which two parties in conflict work with a neutral third-party to produce a written agreement that will resolve the immediate conflict.

**Mediator:** A third-party neutral person assisting the parties in reaching a mediated agreement. Mediators do not give legal advice, interpret facts, or produce legal judgments. Their role is to help the parties communicate effectively and productively in order to come to an agreement.

**Family Mediation:** The term “family mediation” can be widely defined to include any kind of mediation that deals with family matters including divorce mediation, probate mediation, and parent-child mediation. This paper focuses specifically on mediation involving the dissolution of a family unit or a family unit that has dissolved in the past. This includes divorcing parties who may or may not have children as well as parties who never married and have shared children. Terms that fall under this category of family mediation include divorce mediation, child-custody mediation, adoption mediation, and parenting plan mediation. Many mediators use the umbrella term “family mediation” to describe what their organization or business does even if they handle only one category of family mediation. For the sake of simplicity, I will use the term “family mediation” to describe the mediation of conflicts arising from the dissolution of family units. I will term those who handle these types of cases “family mediators.”

**Intimate Partner Violence (IPV):** Refers to any form of physical, sexual, or psychological harm by a current or former partner or spouse. Intimate partner violence has essentially the same meaning as domestic violence. Researchers and experts on abuse have largely transitioned to using the IPV terminology. Many people, mediators included,

continue to use the term “domestic violence” with a similar definition. Some of the research cited in this paper originated before this shift was made. Both intimate partner violence and domestic violence have been defined in numerous ways with varying thresholds of violence and control necessary to qualify for the use of either term. For the purposes of this paper, a broad definition of IPV will be used as clients who have experienced a broad range of violence, control, and intimidation may utilize mediation. It should also be noted that alleged IPV does not necessarily mean actual IPV. When I write that a mediation involves IPV, an indication of IPV, or a history of IPV, I mean that one or both of the parties has mentioned IPV or situations resembling IPV as a concern in the past, present, or future. This information is self-reported and not necessarily consistent for both parties in a mediation. Nor does the mention or reporting mean that IPV has definitely occurred.

**Survivor:** Those who have endured IPV have historically been called the “victim.” Currently many researchers and practitioners use the term “survivor” instead. This is a conscious reframing of the survivor’s situation to acknowledge that the person has agency in the situation and will continue to persevere in the face of adversity. The term “victim” implies a continued lack of situational control that is counterproductive to the goal of escaping IPV. The use of the term “survivor” is not yet universal and is sometimes used interchangeably with the term “victim.” For the purposes of this paper, the term “survivor” will be used when referring to those who have experienced IPV. Some of the participants in my research referred to survivors as victims or the abused. My understanding is that all three of these terms meant the same to all participants.



**Abuser:** The person who has allegedly or actually committed intimate partner violence may be called the abuser or the batterer by researchers and participants in this study. There are often complications in terminology in situations involving mutual violence. It is sometimes the case that both parties claim that the other has committed some form of intimate partner violence.

**Ground Rules:** Refers to the basic principles of behavior by which all participants in a mediation are expected to abide and to which they have agreed.

**Intervention:** Refers to actions a mediator might take to prevent problematic behavior or reduce conflict in a mediation, or to improve communication, understanding, empathy, or problem solving.

**Strategy:** Refers to other kinds of actions a mediator might employ that would have an effect on mediation. Strategies are overall approaches to mediation, while interventions are single actions taken within a mediation.

## CHAPTER II

### LITERATURE REVIEW

The literature about mediation and IPV can in large part be divided into four topics that frame the discussion about IPV and mediation: 1) the appropriateness of mediation when IPV is involved; 2) the detection of IPV prior to or during mediation; 3) the outcome of mediating cases involving IPV, including the legal outcome and the effect on the parties; 4) mediator strategies for working with clients who have experienced IPV. I will first address IPV in general and then address specifically the four categories involving mediation in cases involving IPV. Finally, I will address mediation laws specific to Oregon.

#### **Intimate Partner Violence: Definitions and General Information**

Intimate partner violence is strikingly prevalent in the United States. One out of every four women will be physically abused by an intimate partner in their lifetime (Holtzworth-Munroe, 2011). IPV has been defined as “a pattern of coercive control that may be primarily made up of psychological abuse, sexual coercion, or economic abuse, that is punctuated by one or more acts of frightening physical violence, credible threat of physical harm, or sexual assault” (Bancroft, 2010). It is associated with negative outcomes both for the individuals suffering from the abuse and the children in families with a history of IPV. These include academic, psychological, and behavioral issues (Holtzworth-Munroe, 2011). While IPV is often thought of purely in terms of physical violence, psychological abuse and trauma are frequently cause for equal concern, even in the absence of physical violence (Hall, Walters, and Basile, 2012). In divorce, and

divorce mediation especially, there are particular concerns regarding the continuation of IPV. The issues become more complicated when children are involved. Here the concern is for both the environment and well-being of the children. The potential for the abuser to maintain contact with and control over their victim through the children is also of concern.

IPV researchers have identified four types of IPV: Physical, psychological, sexual, and stalking.

Physical abuse is what we would typically consider to be called intimate partner violence. It involves an act or threat of physical aggression intended to harm the victim (Hall, Walters, and Basile, 2012).

Psychological abuse can entail emotional or verbal assaults such as yelling, or withholding emotional support or affection to produce compliance. It may also take the form of domination/isolation, where the abuser seeks to limit the victim's access to resources or communication.

Sexual abuse includes coerced or forced sex, or sex where consent is not possible. Physical coercion is not a requirement, as sexual abuse can stem from bullying behavior, begging or pleading, or a sense of duty (Hall, Walters, and Basile, 2012).

Stalking is not universally categorized as a unique form of abuse, as many stalking behaviors, like intimidation or obsessive following fall under other types of abuse. It is still important to recognize the profound effect that stalking can have on a person, no matter how it is categorized.

Not all abusers are men and not all victims are women. While this may be the most common configuration, men can be victims and women the abusers. Similarly,

same-sex couples can also experience IPV. It is a weakness of the current literature involving IPV and mediation that most of the IPV that is identified and studied is male-to-female violence. This may or may not be the fault of the researchers taking into account the challenges in gathering data among male victims may be difficult due to underreporting. Furthermore, it is only fairly recently that information on IPV in same-sex partnerships has been gathered. Most of the researchers cited here only studied male-to-female violence.

### **The Appropriateness of Mediation**

The first category of literature centers on the usefulness or appropriateness of mediation in cases involving IPV. That mediation should be utilized in such situations is not a given for many practitioners. Some practitioners consider its use to be dangerous for the participants and possibly for the children as well (Johnson, Saccuzzo, and Koen, 2005). In divorce cases not affected by a history of IPV, studies have shown that mediation lessens anxiety for the participating parties and it is associated with better outcomes for the children (Walton, Oliver, and Griffen, 1999). There are significant benefits to mediation as an alternative to adjudication in divorce and custody disputes, but these benefits may not be present for families with a history of IPV. Furthermore, mediation could have a negative effect on victims of IPV. Studies like the one performed by Rivera, Zeoli, and Sullivan (2012) have shown that mediation was detrimental to the women being studied in at least some circumstances. Specifically, women in the study reported that mediators were insensitive, interrogative, and occasionally bullying with

regard to allegations of IPV during mediation. The researchers concluded that their study showed support for the idea that mediation re-victimizes survivors of IPV.

Other studies have shown that while some safeguards against continued violence or abuse in mediation agreements have benefited families, these safeguards are not always included in a mediated agreement (Rivera, Zeoli, and Sullivan, 2012).<sup>2</sup>

Overall, research in this area shows that while mediation can be beneficial in these cases but, depending on the unique circumstances of each case, it has the potential to be, highly detrimental.

Pressures on a mediation session are heightened when the parties share children, and custody is an issue. The parties must consider the safety of the children in any agreement, as well as the safety of the victim. If one party is being coerced by the other, then the best interests of the children may not be taken into account. There is also the additional concern that the children will be used by one of the parties to continue IPV. In the study conducted by Rivera, Zeoli, Sullivan (2012), one woman interviewed indicated that she wanted to give custody to the father *because* she felt he was dangerous and she was worried that he would harm her or the children if they were taken from him. While the mediator rebuked her in this case, which in itself seems like an unprofessional reaction, it still shows the effect that a history of IPV can have on the survivor in a mediation.

In Johnson, Saccuzzo, and Koen's (2005) study, they looked at the recommendations made by California court-appointed mediators to judges in cases of non-agreement. The researchers were able to create two pools of these recommendations

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<sup>2</sup> Based on my research, it does not appear research has been done on the effectiveness of including such safeguards.

for comparison: those cases involving domestic violence and those not, with their findings indicating that mediators were doing little to encourage safety in those cases involving domestic violence. The researchers concluded that mediators were putting IPV survivors in vulnerable positions by recommending that the abuser have joint custody and unsupervised time with the children, and failing to disclose indications of IPV to the judge. It should be noted that the researcher's measures for what kinds of custody orders were safe or unsafe for families were not tested. For example, they found that mediators recommended primary physical custody for the father in 9.7% of the time in DV cases and 8.9% of the time in non-DV cases, which is not a statistically significant difference. The point they made with this is that there was not a significant difference in primary custody even if the father was a perpetrator of DV, but they could not say whether mothers or children were more likely to be harmed when the father had primary physical custody. To my knowledge, no studies have undertaken to assess in a longitudinal way the kinds of mediation agreements that are safe or unsafe for families.

Advocates for mediation in some situations involving IPV assert that barring families with a history of IPV from mediation is disempowering, since it removes available options, and that it could lead to better agreements for all those involved (Baily and McCarty, 2009; Field, 2004; Walton, Oliver, and Griffin, 1999). Detractors counter that mediation only worsens situations of abuse (Folburg, Milne, and Salem, 2004). Completely removing the option of mediation in all cases involving IPV would limit the choices that a victim of IPV could make. It could be true that mediation is not the correct choice in a particular circumstance, but it could also be true that mediation would be highly beneficial. The appropriateness of mediation in divorces of families with a history

of IPV should be determined on a case-by-case basis. In any circumstance, mediators must determine whether a conflict is right for mediation or not. In addition, the mediator needs to be aware of the dynamics of IPV and tailor the mediation to fit the circumstances (Folburg, Milne, and Salem, 2004).

### **The Detection of Intimate Partner Violence**

A second topic addressed in the literature revolves around the ability of mediators or mediation centers to detect a history of IPV. The literature talks about the high variation among procedures used to detect IPV. Some studies question the ability of many practices to accurately assess the presence of IPV, or the level of danger involved (Ballard, Holtzworth-Munroe, Applegate, and Beck, 2011). As mentioned previously, the rates of cases that involve IPV vary greatly from study to study. Furthermore, some studies have shown that rates of cases involving IPV are actually greater than detected by mediators (Johnson, Saccuzzo, and Koen, 2005). Most detection methods rely on self-reporting, either in pre-screening surveys, or in interviews. In some cases, IPV is apparent due to the presence of restraining orders or other court history. Even in these cases, mediators are not always aware of the court history (Rivers, Zeoli, and Sullivan, 2012).

Ballard, Holtzworth-Munroe, Applegate, Beck (2011) performed a study which supported the notion that mediation programs that do not conduct systematic assessments for IPV under-detect.<sup>3</sup> This is despite findings that show accurate detection methods

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<sup>3</sup> This study referenced similar studies done with other professionals, such as physicians and therapists, that found similar results. They also stated that many professionals who do not systematically screen for IPV do not think that they are under-detecting.

exist and are widely available<sup>4</sup> (Ballard, Holtzworth-Munroe, Applegate, Beck, 2011). This does not mean, however, that mediators and mediation programs are oblivious to the problems IPV can pose to mediation. One study showed that 70 percent of mediation programs had IPV specific training and 80 percent gave some kind of IPV-related screening (Holtzworth-Munroe, 2011). Although this shows awareness, 50% of the programs did not separate parties during the screening. Other programs failed to ask direct questions about the IPV (Ballard, Holtzworth-Munroe, Applegate, Beck, 2011). The mediation program that Ballard, Holtzworth-Munroe, Applegate, and Beck used as their test relied on a pre-mediation questionnaire and a verbal screening by the mediator. They found that a behaviorally specific<sup>5</sup> screening detected more cases of IPV than did the standard screening.

Outside of the pre-mediation case assessment, the most common way that mediators become aware of IPV is by the self-identification of the victims. This is problematic for a variety of reasons. The first is that only a small percentage of families with a history of IPV will self-identify during the mediation process (Rivera, Zeoli, and Sullivan, 2012). Further, mediators are less likely to be equipped to handle a revelation of IPV without prior knowledge (Rivera, Zeoli, and Sullivan, 2012). An additional problem is that some mediators hear the concerns of one or both of the parties but fail to take any substantial action, such as separating the clients. This phenomenon is illustrated in a study performed by Rivera, Zeoli, and Sullivan (2012). The researchers found that many mediators asked if there was “documentation” when parties identified IPV as a concern.

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<sup>4</sup> Specifically, the researchers used the Relationship Behavior Rating Scale as an enhanced screening tool.

<sup>5</sup> This refers to questions like “has the other parent threatened you with a weapon?” versus a non-behaviorally specific question like “has the other parent committed domestic violence?”



If there was no documentation, mediators in the study would frequently ignore clients' concerns.

### **The Effect of Intimate Partner Violence on Mediation Agreements**

A third topic in the literature deals with the effect of IPV on mediation and the agreements produced by such mediation. Most of the literature in this area compares agreements generated by parties with a history of IPV with those who do not have a history of IPV. In several studies, the findings were consistent: there was no statistically significant difference between the two types of agreement in most of the identified sections of the agreement. There was, however, an increase in specific safety provisions when the parties had a history of IPV. These would be clauses like “adults shall not use drugs or alcohol in the presence of the child” (Putz, Ballard, Arany, Applegate, and Holtzworth-Munroe, 2012). Furthermore, cases involving a history of IPV showed a slight increase in counseling referrals. At the very least, these results show that the victims or survivors of IPV do not do worse in mediation than those who have not experienced IPV. However, the results also reflect a lack of significant safeguards for the victims once the agreement is enacted. For example there was not a greater incidence of mandated public exchanges of the children between the parents in cases involving IPV.

Rivers, Zeoli, and Sullivan (2012) researched the reaction of mediators to the allegation of IPV in mediations. They did this by interviewing and surveying victims of IPV who participated in mediation. Much of the information presented in this study points to mediators not reacting to IPV, either when they have prior knowledge, or when it is alleged during the mediation. Frequently, persons alleging IPV would be asked to

provide documentation. While substantiated physical abuse was found to have been taken seriously, psychological or emotional abuse was frequently ignored due to the lack of documentation. Furthermore, the study found, in concurrence with the studies mentioned above, no statistically significant portion of agreements provided for additional safety provisions for the alleged victims of abuse.

Johnson, Saccuzzo, and Koen, (2005) identify several potential negative consequences of the presence of IPV in mediations. First, the abusive party may be able to use their power to influence the outcome of the mediation. This can be true even if the parties no longer live together or no longer have contact. Second, the presence or history of IPV may prevent one or both of the parties from ably advocating for themselves or their child. Third, the process itself could re-victimize the abused party or put them in a position at risk of further abuse. Significant harm is more likely during the separation phase of a disintegrating relationship (Johnson, Saccuzzo, and Koen, 2005). Finally, the process has the potential to traumatize the children involved (Johnson, Saccuzzo, and Koen, 2005). While these are all potentially negative outcomes, mediation has the potential for producing safer agreements than an adversarial process. When empowered and un-coerced, victims of IPV in mediation are more able to advocate for specific provisions that they need in order to be safe from continued abuse. Furthermore, mediation is often reported to reduce trauma and conflict for the children involved (Walton, Oliver, and Griffin, 1999).

One of the reasons given by proponents of mediation for families with a history of IPV is that it may allow the participants to tailor agreements to reduce violence and its effect on children. Mediated agreements are also more likely to result in joint custody

than agreements made by the court (Bailey and McCarty, 2009). Bailey and McCarty (2009) equate this with empowerment for the participants, but that seems difficult to determine without knowing what the interests of the parties are. In Texas where their study was conducted, men were much less likely to get any custody within the standard agreements imposed by law. It seems likely that the men were more empowered in a mediated custody process. It is not clear whether or not the women were more empowered, however, and it seems likely that the women in this context are losing power.

In sum, current or historical IPV within a family can have numerous different effects on the process of mediation but the major concern is that it has the potential to overwhelm or obscure the interests of the victim, which could in turn affect the well-being of any children involved. It is the mediator's job to uncover interests and the presence of IPV. Both known and unknown IPV can profoundly impact their ability to do well in mediation

### **Mediator Strategies**

The fourth topic in the literature addresses the strategies used by mediators when clients may have experienced IPV. Researchers have identified a number of ways that mediators can work with parties who may have experienced domestic violence. These are (not in an order of importance):

1. Shuttle mediation, phone mediation, and separate sessions: Shuttle mediation is perhaps the most referenced safeguard against continued abuse, intimidation, and disempowerment within the mediation. As a basic definition

shuttle mediation is a type of mediation in which the mediator meets with each party separately. This is contrasted with meeting jointly with both parties, which is often the default in mediation. While the concept of shuttle mediation is simple, there are several possible permutations. The parties can be seated in separate rooms while the mediator moves back and forth in real time. The mediator can alternately call each party on the phone. Another potential option is for the mediator to have separate sessions at separate times so that the parties are never be in the building at the same time. In this scenario it is important for times and locations of meetings to be kept confidential. Some researchers and mediators also mention the potential for video conferencing technology to be introduced into mediation, although this does not seem to be an option for many mediators as of yet (Folberg, Milne, and Salem, 2004). Keeping parties separate has several benefits. Most obviously, it reduces the threat of immediate physical violence. It also slows down the mediation process, which is beneficial because the immediacy of face-to-face negotiation can be stressful and more likely to lead to emotional escalation. Separation gives each party a chance to reflect on proposals and reduces the pressure of generating immediate counterproposals. It also gives the mediator the ability to be frank with each party without worrying about the immediate dynamics between the parties. Despite these benefits, IPV experts have noted it is possible for the mediator to become the unwitting messenger for abusive language in shuttle mediation (Rivera, Zeoli, and Sullivan, 2012). As might be the case in joint session mediation, the mediator might not be

fully aware of the impact of certain words or phrases on the parties (Rivera, Zeoli, and Sullivan, 2012). From a logistical standpoint, shuttle mediation can slow down progress as even easy decisions must be carried back and forth between parties. Not all clients have the time or resources for extended mediation.

2. Restricting mediation to particular topics: Folberg, Milne, and Salem (2004) recommended that several topics should be off limits in mediation including whether or not abuse occurred, reconciliation, restraining orders, and threshold and access issues. Their concern was that mediation be focused on pertinent issues and that abuse not be negotiable. Furthermore, the researchers emphasized that where mediation is voluntary, either party should be able to opt out at any time.
3. Having support persons in mediation: Another often cited safeguard for survivors of IPV is the inclusion of support personnel such as attorneys, IPV survivor advocates, and friends and family members in the mediation room. Part of ensuring the safety of participants in mediation is making sure they have a support system around them as well as the information to advocate for themselves and the confidence to do so (Field, 2004). The ability to consult an attorney is quite important in this regard. Field makes the argument that attorneys should be present during mediations involving IPV in order to provide legal support and a sense of protection. Other researchers have noted that the ability of clients to access legal support outside of mediation is important as well (Folberg, Milne, and Salem, 2004).

4. Separate waiting rooms/staggered arrival and departure times: Some researchers recommended that mediators make separate waiting rooms available and arrange arrival times so that the parties never run into each other on the way to or from mediation (Folberg, Milne, and Salem, 2004). This allows a mediation to take place in the same building and at the same time but without the opportunity for an abusive party to intimidate or coerce a survivor in the space outside the session.
5. Checking-in frequently: Checking-in refers to asking a party in a mediation how things are going for them. Often, this is about the issues of mediation, but it can also be about a person's emotional state or sense of safety. Folberg, Milne, and Salem (2004) recommend that mediators do this so they do not miss intimidating or abusive behavior that they may have failed to recognize. With regard to IPV, check-ins are usually done individually.
6. Security escorts and metal detectors: As with some of the above strategies, providing security escorts and having metal detectors is aimed at participant safety. Mediation can be an emotionally volatile time for some people, and having these security measures in place adds a layer of safety (Folber, Milne, and Salem, 2004).

### **Oregon Statutes Concerning Family Mediation**

Oregon Statute 107.755-107.795 outlines the rules, methods, and scope of court-ordered mediation for family cases. The statute requires that a mediation orientation session be provided by each judicial district “for all parties in cases in which child

custody, parenting time or visitation is in dispute, and in any other domestic relations case in which mediation has been ordered” (ORS 107.755 (1)(a)). The orientation is required to provide parties with information regarding mediation, mediation options, and advantages and disadvantages. Parties are required to attend a mediation orientation session before there is a “judicial determination of the issues” (ORS107.775(1)(b)). Judicial districts are also required to provide mediation. Unlike some other states, however, parties are not actually required to attend actual mediation sessions, only the orientation. The ORS also mandates that programs screen for domestic violence and develop a plan that addresses domestic violence. Programs consult with domestic violence experts with regard to developing their procedures and protocols. Mediators are required to attend ongoing domestic violence training.

In theory, the Oregon statutes have accounted for many of the issues with mediation in cases involving a history of domestic violence. Parties are not forced to attend mediation together or at all. Programs are required to screen for domestic violence and have a plan for when it is present. Programs are also required to implement safety protocols for those who do decide to mediate. These statutes, being only statutes, are not very specific about what programs should actually do. That is up to the courts in each jurisdiction and to the people running the programs. In practice, this might look a lot different than it does in theory. Just because a mediator attends a domestic violence training of some kind, for example, does not necessarily mean that they are able to protect victims of abuse when it comes time to mediate. The effectiveness of mediation programs and individual mediators is in large part still the province of individual jurisdictions. Despite this, in Oregon we can put to rest claims that mediators are

untrained and unprepared for matters involving domestic violence. Each jurisdiction must have trained mediators and must be sensitive to domestic violence issues.



## **CHAPTER III**

### **METHODOLOGY**

I collected data for my research via questionnaire and interview. The former was a questionnaire containing twenty-two questions in a variety of formats (see Appendix A). The purpose of the questionnaire was to gather information including demographics, organizational policies, etc.

The interview portion of the study allowed more in-depth information on the topic. Participants were given a standard set of interview questions prior to the interview (see Appendix B) with follow-up questions asked for clarity or additional information. Each interview was somewhat unique in terms of topics and breadth.

Participants were drawn from a list of court approved Oregon mediators and mediators working for mediation organizations. The only requirement was that the mediators be located in Oregon and have experience mediating cases related to divorce or child custody. Participants self-selected for participation by choosing to respond or not. Most of the interviews were conducted over the phone due to distance or weather conditions and surveys were in large part filled out electronically and emailed back to me.

My method of analysis was qualitative. Much of the information I gathered could not be neatly interpreted with statistical analysis, nor would such results provide meaningful conclusions.<sup>6</sup> I categorized the interview and survey responses into descriptive categories. Each mediator was asked about their screening procedure, for

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<sup>6</sup> Some data, such as age, education level, etc., is quantitative and will be presented as such. However, statistical analysis of such a small sample size would not yield meaningful results.

example, and the features of a screening procedure were divided up into the method of screening, questions asked, and types of information gathered.

There are some limitations to this paper. First is the sample size. Because of limitations to time and access, the sample of respondents is likely not representative of all family mediators. A second limitation is that information gathered was based on the self-reporting of mediators. No person would want to portray themselves or their organization in a negative light. Consequently, the strategies illustrated may be best case scenarios and may vary to one degree or another from actual practice. A third limitation is that this study does not evaluate the effectiveness of any of these strategies. It is hard to say if what these mediators report doing in cases of IPV is beneficial or leads to a different outcome. In the general research regarding mediation and IPV, the effectiveness of particular strategies on a generalizable population of parties might be an area that requires further study.

## CHAPTER IV

### RESULTS

Mediation is as much art as it is science. As much knowledge and information as was gained from this research, it is very hard to teach someone what to say and do in every specific circumstance because all circumstances will be different. Many participants in this study noted as much in their responses. Some components of mediation lend themselves to concrete description. Buildings, seating arrangements, and screening questionnaires, for example, were easy for mediators to describe since there could only be a few permutations and the effects they had on mediation were often similar in different contexts. Other items, such as increased sensitivity or appropriate phrasing were much more difficult to describe since their use is so context dependent. For many of the mediators I talked to, knowing what to say and how to react seemed to come from intuition developed by experience. It is not something that is scripted or memorized. Despite this, each mediator was able to describe several different techniques and strategies for working with parties who may have had a history of IPV.

#### **Demographic Information<sup>7</sup>**

Ten mediators from the state of Oregon were interviewed as part of this study. Four were males and six were females. Every mediator held an advanced degree: a Master's degree, a PhD, a JD, or some combination of the three. Only one mediator held solely a JD, while two mediators held a Master's, JD, and PhD. Two mediators did not

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<sup>7</sup> A table of the responses to the demographic questions is available in Appendix C.

report on this aspect of the questionnaire.<sup>8</sup> The ages of the mediators ranged from thirty-two to sixty-seven. The mean age was fifty-one while the median age was fifty-two. One mediator did not report age. Experience doing family mediation varied from one year to twenty years. For the most part mediators fell into two groups: having two years or less of experience or more than ten years of experience. The largest organization within which a mediator worked was comprised of five mediators. Four mediators operated primarily by themselves, while four mediators operated in organizations of three people. In some smaller counties, multiple mediators take court-mandated family mediation cases, but each person operates individually, as was the case with two of the participants in this study. The number of cases each mediator took per year varied widely from mediator to mediator depending on their employment status and location. Mediators reported the approximate number of cases per year since it often varied. Four mediators reported taking fewer than fifty cases per year with one of those mediators taking between twelve and twenty cases. Five mediators reported taking between one hundred and two hundred cases per year, with four of those respondents being on the higher end of that range. Most of the mediators mediating fewer than fifty cases per year did family mediation part time. For some, this was due to the low number of cases in their area. For others, it was an employment choice. All mediators reported that they would still mediate when some amount of IPV had occurred between the clients. Later on I will discuss when and why mediators would choose not to mediate. All mediators but one reported that they screen specifically for IPV. As we shall see, the ways in which this was done varied.

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<sup>8</sup> Not every participant answered every question and some questions were answered in different ways.

## **General Philosophies**

Most of the mediators reported, in one form or another that they felt differently about how to conduct mediation when IPV was a factor for one of the parties. Although the focus of this paper is on the concrete strategies, I would be remiss not to mention the overarching philosophies of mediating in the shadow of IPV. As noted earlier, the mediators I interviewed come from a variety of backgrounds. Although all of them currently practice in Oregon, the populations they serve vary significantly. Their philosophies toward mediating with those who may have experienced intimate partner violence vary somewhat but also contain a few of the same components. Several mediators reported that knowledge of alleged or actual IPV heightened their sensitivity in the mediation room. Mediators in this situation were apt to step in more quickly if they felt the situation escalating. They were more cognizant of body language and facial expressions. Sometimes these mediators would respond more quickly or strongly to ambiguous behavior.

As far as addressing IPV, two mediators reported specifically that debating instances of past IPV was strictly off-limits in mediation. Oregon statute specifically forbids negotiating the terms of a restraining order in the context of parenting plan mediation (ORS 107.755 (1)(d)(B), 2011). Thus, restraining orders became a non-negotiable fact of mediation. For some mediators, this is a boon that allows them to discuss topics that might otherwise be inaccessible. This is because a restraining order inarguably restricts one party from coming into contact with the other. There could be no arguing, for example, about exchanging the children at school. For others, the facts of a case prior to mediation are immaterial. Focus is brought away from whether or not IPV

occurred, how it may have occurred, or when it may have occurred. Instead, mediators focus on how each client feels currently, and what they see in the future. Although the past is important in forming these points of view, each party comes with their own reality and it is counterproductive for the mediator to facilitate an argument over the facts. The existence of a restraining order does not change this philosophy, since it is a factor that affects the present and future. One mediator I spoke to summed up this philosophy by saying

Yeah well I certainly don't have the time or have the desire to go into the details of what's happened in the past. So the question, you know, we learn from the past and we are influenced by the past but the question is, you know, what is it that you want for the future based on that. Not just on what's happened, but on your values and your hopes for the future.

This is a philosophy I would call future-oriented. Contrast this with the way that many clients initially approach mediation. Their focus is on their experience of past events and their options are based in their past experience: a past-oriented philosophy. The above-quoted mediator sees the mediator's role as encouraging clients to move from a past-oriented philosophy to a future-oriented philosophy.

## **Structural Components**

### *The Physical Setting*

The physical space in which mediators conducted mediations differed from organization to organization. The physical space is important because it can have a major impact on the logistics of mediation and the types of safety measures that an organization can offer to survivors of IPV. Many of the court connected mediators practiced in or near courthouses which gave them access to court house security measures like metal detectors and security personnel. The courthouse structure also sometimes limited space and options since the rooms were not necessarily designed with mediation in mind. Of the mediators not located in court houses the concerns were reversed. The offices were often unsecured, but well designed for mediation.

Of particular concern is the ability of mediators to conduct shuttle mediation without the clients coming into contact with one another. This is important for survivors of IPV because the positive effects of shuttle mediation would be nullified if the parents were sitting in the same waiting room and passing each other in the hallway. Few of the mediators were concerned with their offices affecting the way mediations were conducted. They were aware of the limitations of the space and had found ways to compensate for them. It is also true that the physical setting is probably the most difficult aspect of mediation to change. Even had the mediators been unsatisfied, it is unlikely that change of venue would be feasible. One mediator did mention that if safety was a concern they would only schedule mediations during regular business hours, whereas they might be more flexible in cases that did not include the presence of IPV.

Three of the mediators operated in suites of offices with two separate waiting rooms. This setup allows the clients to never see each other if they choose. Another mediator, operating in a rural area, had only a room in the courthouse. During shuttle mediation the second parent would simply be waiting in the court house lobby. Two other mediators working in semi-rural environments, small towns but with significant professional populations, were set up differently. One operated in an office and a conference room on the second story of the courthouse. Since the two rooms were next to each other, however, shuttle mediation needed to be done by letting one party wait in the lobby. This mediator was able to creatively shuffle the participants by putting one in the elevator while the other came up the stairs. The other mediator used professional offices instead of a public building for mediation. Parties often waited in the hall during her mediations, though she also had use of a second office just across the hall. She was also able to utilize the fact that the building had two separate entrances. Three other mediators operated in more urban settings. Each of their suites was located in a secure court house type building. One mediator described her suite as “tiny” but indicated that the private offices allowed for separate seating and easy shuttle mediation. The other mediators operating in a similar setting were able to work in similar ways due to their offices. The final respondent worked from a home office but rented rooms in an office building on a case-by-case basis.

### *Meeting Structure*

Most of the mediators were unable to change their physical location, but many managed to creatively use the quirks of their spaces to their advantage. Most important



was the ability to keep participants separate in all situations, including during mediation and when arriving and departing. Mediators who were not able to do this effectively due to their physical space or the seriousness of the threat often found ways to mediate with participants in different locations. The most common way to do this was over the phone, although mediators identified a few different ways that they used the phone. Perhaps the most common was shuttle mediation by phone. Mediators would contact each participant separately over the phone. This is about the least amount of contact two parties can have while still mediating. Some mediators would go back and forth frequently as they would if they were shuttling between different rooms. One mediator conducted mediation like this more informally by making calls at less regular intervals and assimilating email into the process. A few of the mediators expressed that this kind of mediation is often something of a last resort because it is so much slower than joint sessions. It can also be frustrating for mediators since they lose cues like body language and tone of voice. One mediator indicated that he was able to talk to both parents at once in a conference call. However, several mediators noted that their clients often did not even want to hear the other parent's voice and preferred to not be on conference call.

Another way mediators used the phone was to have one parent in the building and the other over the phone. Most of the mediators who did this indicated that they shuttled between the parent in-person and the one on the phone so that each conversation was private. One mediator used a unique system in which she talked on the phone to one client while the other talked to her in person at the same time. The result is a kind of shuttle hybrid where the clients cannot hear each other but the mediator can hear both parties at the same time. The mediator described her system like this:

When I have people that don't want to hear each other I do the phone conference, I hold the phone and they can both hear me speak. They cannot hear each other's voice. So if Joe says something to me, Joe can hear what I say as a summary statement to the other party on the phone and then the other party hears me say what they said back to Joe. And that way I'm not, if I get anything wrong they can say no, no that's not right, right then and there.

For this mediator, this system was faster and more accurate than shuttle mediation would be, but still allowed for a large degree of separation.

The other primary form of client separation practiced by mediators was simple shuttle mediation. 90%<sup>9</sup> of the mediators in this study used shuttle mediation. This took two forms depending on the physical space used by the mediators. The first form is simply that each client sits in a separate room and the mediator moves back and forth between the two. The benefits to this format are speed, as no time is wasted making phone calls or shuffling the participants between rooms, and comfort for the participants. Remaining in a single room, versus moving to a public lobby to wait, allows participants to be undisturbed while the mediator is away. If advocates or other support persons are allowed in mediation it also gives the client and their advocate privacy. This arrangement requires that a mediator have two empty offices sufficiently far apart so that eavesdropping would be impossible. Many mediators confirmed that this arrangement is

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<sup>9</sup> Due to the small sample size of this study, these percentages are not generalizable to all mediators.

often not possible due to space constraints. One mediator noted that, while he has two rooms, they share a wall and so are not suitable for shuttle mediation. Mediators in this situation often used the second form of shuttle mediation. This involves the clients taking turns in a single office with the mediator. Depending on the situation, the mediator may arrange movement so that the parties do not see each other in transit, though this is sometimes difficult. Here, waiting rooms also come into play. Some mediators have two or more waiting rooms in order to keep clients separate. Other mediators do not have waiting rooms and so the clients wait in courthouse lobbies or other places. This has the obvious disadvantage of forcing clients, who may be emotionally escalated, to move around in public spaces. Of course for some clients, space and fresh air might be more beneficial than privacy.

Physical limitations aside, the mediator must determine what kind of meeting structure works best for their client. The mediators I spoke to all considered seating arrangements prior to starting mediation and often discussed it with their clients. If, during screening and individual sessions it became apparent that IPV may be a factor, most of the mediators would then give their clients options for seating. All of the mediators said that, for the most part, they allowed clients to decide between shuttle mediation, joint mediation, or any other options that were available. Several mediators said specifically that they would not force anyone to be in the same room with the other client.<sup>10</sup> For all the mediators, client safety trumped all other concerns. If a client felt unsafe being in the same room or the same building, mediators would work to accommodate that. Mediators reported typically being willing to try joint mediation if the

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<sup>10</sup> None of the mediators in this study indicated that they would force participants to be in the same room, though I did not ask that specific question.

both clients requested it, even if IPV may have been present. This is a situation where mediators were sometimes forced to make judgment calls. Several, but not all, mediators reported there being times when both parents would have mediated in the same room, but they, as mediator, made the choice to keep the clients in separate rooms. 50% of the mediators indicated that sometimes they choose to not even give the clients an option.

One mediator said this:

I certainly have had occasions where I've used my judgment to keep parents in separate rooms. Um and I think that has probably worked better for them. But it hasn't necessarily been in contrast to what they wanted to have happen. I just, I made that judgment call by not offering the option of having them meet together. Not more so than them saying they want to be together and I've said no. If parents specifically both say they want to meet together then I generally don't stop them, but there's times where I haven't offered the option of meeting together.

There are a few reasons a mediator might do this. First, the mediator might decide that a client cannot safely mediate in the same room as the other person. Second, the mediator might decide that the session will be more productive if the clients are in different rooms. Most of the mediators said in some form that joint sessions are usually faster and more productive, but they also acknowledged that shuttle mediation has other benefits. Shuttle mediation slows down the negotiation, allows the mediator to reframe aggressive language, and allows the clients to save face when confronted by bad news. In situations

where face-to-face contact might lead to escalation or impasse, shuttle mediation might be the more productive choice. The mediator must weigh these benefits when deciding how to structure mediation.

### *Safety Measures*

All of the mediators were able to take measures to ensure the safety of the participants. These safety measures included staggering departure and arrival times, panic buttons and other methods for calling help, safety escorts, proximity to security personnel, and building security.

Some of the safety measures employed by mediators were structural in nature and not necessarily premeditated components of a family mediation program. Security and screening personnel, safety escorts, and metal detectors all fall into this category. These kinds of measures tended to exist at programs located in or adjacent to courthouses since security and screening personnel, and metal detectors are standard at such locations. Likewise, the proximity of sheriff's offices and other kinds of security employees allowed courthouse-located mediators to access personnel to escort clients to their cars after mediation. Programs located in other public buildings or private offices did not have these kinds of security measures presumably because they are cost prohibitive. The mediators operating without this kind of security expressed awareness of the issues that might arise from the lack of security but they did not express much concern. Said one mediator who operated by herself in an office building:

And I've never had anybody, and we're a big gun county, I'll tell ya, I've never had anybody do anything physically threatening. Partially because they know that my office is an extension of the court. They know they'd have to kill me to get away with it. So nobody's ever tried anything. Not that it couldn't happen, but it's not likely.

Her lack of concern was born out of years of experience wherein nothing threatening had ever really happened. This particular mediator stated that they had never needed to summon any kind of help to deal with an aggressive or threatening individual. Other mediators, operating with more security, found it necessary to call for help almost every year. The reason for the discrepancy in experience is complicated with a mix of factors likely at work. Those who reported summoning help were, with one exception, operating in larger programs, and seeing over one hundred cases each year. The volume and diversity of cases may increase the likelihood of security issues occurring. Furthermore, it is possible, though hard to determine from my research, that mediators operating with more security measures are more likely to allow joint sessions when some concern exists, whereas mediators operating alone are likely to use shuttle or phone mediation if there is any indication of danger.

The mediators who reported needing to summon help were usually calling for sheriff's deputies located in or near the building. This kind of service was only available for mediators working in close proximity to a court house. Mediators operating without the support of the sheriff's office seemed not to summon assistance with security threats.

Though some mediators were limited by resources, infrastructure, or location, all of the respondents reported taking some measures to ensure the safety of the clients. The most common measure, almost universal among the mediators I talked to, was staggering arrival and departure times. The basic reason for this was to allow an IPV survivor, or really any party who was fearful, to leave and enter the mediation without having to make contact with the other party. Mediators did this in different ways and in different circumstances. If there was a restraining order, many mediators made the staggered departure times a precondition for mediation. Parents with a restraining order or Family Abuse Protection Act (FAPA) order against them who would not agree to wait in the office for ten or so minutes after the first party left were not allowed to mediate. This was made very clear by the mediators at the beginning. To overcome protestations one mediator suggested framing the rule this way:

Saying things like this is for your own protection so nobody can say anything happened. Uh, and they'll usually go for that. So we will do things like that to deal with the safety issue without talking about it overtly. Because a lot of times that makes it worse. And survivors do not want us to talk overtly about their safety concerns.

The presence of a restraining order makes the implementation of this safety measure simple for mediators. It is for the good of both parties since it would not be in

the best of the restrained person to violate their restraining order.<sup>11</sup> It also allows the mediator to avoid saying that one parent is afraid of the other one.

In some cases, a client is fearful and there is no restraining order. The fearful client might request lead time when departing. Other times, the mediator offers a lead time as a response to the client's safety concerns. When a restraining order was not present, mediators were mixed on how to arrange staggered departure times. Some mediators would request one party, usually the alleged abuser, to wait for ten minutes after the other party's departure before leaving. In this case, these mediators felt that they could not require the non-fearful party to wait to leave. If the party being asked to wait refused, mediators would instead offer the fearful party the ability to wait until the other parent leaves. This is obviously not an optimal situation, but some mediators felt that it was unavoidable. Other mediators were generally less overt about allowing one party to leave first. Instead of telling both the parties that one person would have to wait, the mediator might ask to check in with each party individually at the end and check in with the fearful party first. In doing so, they allowed the fearful party to leave while the mediator checked in with the other party. If already in shuttle mediation, this process is even easier since the mediator can simply meet last with the party they want to keep longest.

Somewhat less common is arranging staggered arrival times for the parties. Only one mediator made arriving at different times a matter of course when IPV might have been involved. This mediator intentionally scheduled the survivor to come in thirty

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<sup>11</sup> Court-connected mediation programs are similar to court hearings in that a FAPA does not restrict clients from being near each other during mediation sessions. Outside of the building, normal FAPA restrictions apply, which is what the mediator is pointing out in this case.



minutes before the other party. This gave the mediator time to do an individual check-in and also prevent the possibility of the parties running into each other as they arrived. This mediator did not let the second party know when the survivor would arrive. Other mediators had different ways of keeping parties separate as they arrived. One mediator took advantage of having multiple entrances by instructing the parties to come in through different entrances. Mediators working in larger organizations tended to have more rooms in their offices which allowed them to sequester clients as they arrived. This does not necessarily prevent the parties from seeing each other as they enter the building, but it does prevent clients from having to share a waiting room. Staggering arrival and departure times is a free and simple way to keep clients separated. It can help to prevent incidents in the building and parking lot and ensure the safety of an IPV survivor.

## **Prior to Mediation**

### *Screening*

Despite utilizing a variety of safety procedures, the mediators interviewed generally ensured the safety of their clients by recognizing and being proactive about potential threats. In order to do this effectively, mediators employed a variety of screening methods to gather information about their clients. In a basic sense mediators screened for IPV, but to really know if IPV occurred or not is rarely possible and not particularly helpful in mediation. What is important to mediators during the screening process is how clients will react to conflict in mediation and in the future. The mediator's role is not to determine whether or not IPV occurred, but rather to understand what effect the clients' experiences will have on mediation. If IPV has occurred, or if a client has

safety concerns, it can have a profound effect on the way they communicate and negotiate. Mediators will ask questions about the past because the answers can be a guide for future interactions. If in the past clients have been unable to talk about their children without yelling at each other, for example, it is likely that such behavior will reoccur in the future. A mediator must determine if this is happening, or has the potential to happen and what can be done about it. The screening process is where mediators look to answer questions like these.

The mediators I interviewed identified two major screening types: verbal (face-to-face or over the phone) and written (usually a survey or questionnaire). In addition to those, some mediators conducted a court records check for restraining orders and FAPAs. Not every mediator used a written questionnaire, though 80% did. It was often given as part of the initial orientation session. If a mediator was part of a larger program the questionnaire was standard among all mediators. In general mediators found the written questionnaires to be more of a place to start verbal screenings than a comprehensive survey. While useful, mediators recognized that in-depth answers were generally not possible in the small space provided. Many of the questions were of the yes/no variety. At best, they provided an outline of the kinds of things a mediator would need to follow up about later. Still, screening ahead of individual meetings with the mediator serves an important purpose. Asking screening questions about IPV is one way to alert new clients to the ways in which survivors can be supported. According to one mediator, many new clients do not realize that the mediators and mediation programs can take measures to ensure their safety and empower them in mediation. Screening questions coupled with

orientation materials can give prospective clients a better understanding of what mediators can do when IPV is a factor.

Verbal screening provides a more in depth probing of the issues between clients. All the mediators interviewed conducted some kind of verbal assessment or screening prior to meeting with both parties together. This screening, also called an individual session by some, took a variety of formats. Some mediators met with each person directly before a joint session. Others met with parties on different days prior to the commencement of mediation. Two mediators indicated that they did verbal screenings almost exclusively over the phone, though others sometimes screened by phone for reasons of safety or distance. Format choices, in person or over the phone, length, time period, often depend on external factors. In larger programs, these factors are primarily directed by program managers and are common among all staff members. Private or individual mediators have more room to make structural choices. One mediator I spoke with felt that clients were generally more candid over the phone, and given schedule limitations and safety concerns, conducted all verbal screenings this way.

Mediators did not use the individual time exclusively to ask questions about IPV. For some clients, IPV is not a factor and issues of safety bear little on mediation. For other clients, safety is the most important factor. Mediators who had previously administered a paper screening reported using that as a guide for issues to bring up in the individual session. If a client marked that IPV had occurred, for example, a mediator might follow up by asking a series of questions about their mindset and experience. Questions such as these might be asked:

1. How are you feeling about talking to the other parent?

2. How do you feel about being in relative proximity to the other parent?
3. Do you have any concerns about your safety?
4. Do you feel threatened or intimidated?
5. Do you feel physically safe in the room with the other parent?
6. Do you feel that you can leave the building safely?
7. Do you want to be in the same space as the other parent?

This list is not comprehensive, nor do all of these questions need to be asked each time. Mediators reported that they would ask such questions if a client indicated that IPV had occurred or if they expressed any kind of fear or trepidation about mediating with the other parent. A few of the mediators I spoke with emphasized that the point of the questioning was not to necessarily find out the truth or severity of past or current abuse. What was more important to them was how the clients felt in the present and what they needed to feel safe and confident going forward. Knowing that physical violence had occurred can be helpful to mediators, especially if it is backed up by restraining orders or criminal charges, however that lone piece of information does little to describe the mindset of individual survivors. As one mediator put it,

I don't ask about domestic violence as a course of action because we're not, and this is just our philosophy, we're not exploring past history. We're really looking at helping them move forward, from the point forward. So we're not gathering much information about the past.

This was a fairly common mindset among mediators. The information gathered during a screening is supposed to relate to the process moving forward.

Another mediator illustrated the kind of conversation a mediator might have during an individual session:

We talk to people about what the options are because if you just ask an open-ended question they often don't know how to sort through what will feel better for them, so we'll problem solving around what would be most comfortable. I always remind them that they do not have to mediate.

Many mediators used this time to work with a fearful client to decide on what measures can be taken to ensure a safe and fair process. I will address these measures in more detail in a later section.

Another component to the screening process used by some mediators is checking court records for Family Abuse Prevention Act orders (FAPAs) and restraining orders. 60% of the mediators reported checking court records themselves to determine if a restraining order had ever been filed between the participants. Other mediators reported asking clients directly if there was a current restraining order. The latter practice, while helpful in gauging what the participants believe to be true, is not always accurate in determining whether or not a restraining order exists, and clients may disagree. Clients are sometimes mistaken about the extent of a restraining order, whether or not it is still in effect, or who it is against. Knowing if there is or has been a restraining order helps mediators understand the seriousness of the circumstance and sometimes helps mediators

to reality-check and enforce ground rules. By itself, knowledge of a restraining order does not necessarily mean much, but coupled with additional screening procedures it can yield a more accurate picture of the clients' relationship.

### *Providing Information and Referrals*

Much of the literature on IPV survivors gives attention to empowerment (Bailey and McCarty, 2009). Likewise, mediators were often aware of the necessity of empowering survivors with regard to the mediation process. Mediators had a variety of ways of empowering survivors but a major one was providing information to clients, including information about mediation and referrals to other professionals. Clients have a variety of issues and many of them need very different services.

For many mediators, the process of providing information began almost immediately. Some organizations made a concerted effort to provide significant amounts of information before a client accessed the services at all.

The initial step is that we make sure people know they don't have to mediate if they're concerned about their safety and there's been DV and they can talk to us about that. They can call us before their appointment. Then the next layers is prior to their actually coming into mediation. If they're new clients or clients that we haven't seen in some time. When we schedule the appointment we send out a one-page front and back informational sheet. One side talks about how mediation works and then the backs side is called diversity in mediation and it has lots of very

specific questions and information about if there's been safety concerns related to DV in your case how you can talk with us about that, where you can get information or resources and that kind of thing

As a mediator it is easy to take for granted that mediation programs routinely work with people who have experienced IPV. For someone who has never been through mediation, mediator awareness of IPV and safeguards for survivors are not a given. In court, for example, survivors are treated as any other person would be. Mediators need to let potential clients know that there are things that they can do when IPV is present. Most of the mediators I spoke to had ways of disseminating information to potential clients about safety measures for survivors. Larger organizations had information available on their websites and sometimes physical information sheets that would be mailed to clients. Both the websites and the information sheets contain general information about mediation and some information about mediating with IPV. One mediator I talked to stressed the importance of getting people information up front:

for a lot of these folks that haven't gotten good information on the front end, and that's why we're doing more and more to get that information out there as early as possible so they know they can call us and ask to come to orientation on a different day. They can do it over the phone, they can ask for a separate waiting area, um, they can ask for secure escort. I mean there are lots of options but if they don't know to ask or if they don't know

if they can ask us, on occasion they will show up here and be in the same waiting room. We do everything we can to prevent that.

Besides organization websites and mail, the orientation session is an important way that mediators provided information. This was true for large organizations and independent mediators, though their styles of delivery vary. Because of organizational differences in size and protocol there was no consensus as to what information should be given and when. Some mediators only mentioned safety measures in response to client concerns while others gave some of this information up front. This difference is at least partially due to infrastructure and resources that are necessary to distribute information. It seems most important that potential clients know that it is not abnormal to have a history of IPV, that mediators can work with clients on their concerns, and that they can and should talk to their mediator about their particular concerns as early as possible. In this vein, mediators and their staff need to be open about fielding inquiries from prospective clients and having information about IPV and mediation available for them in some format.

Mediators should also be prepared with referrals during mediation. Several mediators mentioned that they often make referrals when a client reveals an issue that may require services that a mediator cannot provide. For example, if a client says that their child is distressed every time they come back from the other parent's house but they do not know why, a mediator might respond by offering a referral to a child therapist. Common referrals by the mediators I interviewed were low cost legal help, such as family court assistance offices or pro-bono legal organizations, mental health professionals, domestic violence shelters and services, and substance abuse prevention



organizations. When clients have a history of IPV it may be particularly important to have information about local domestic violence services and shelters.

### *Meeting Separately*

Most mediators have their own way of beginning mediation sessions. At larger organizations, a client's first contact with the mediation process, assuming they haven't mediated before, might be at a group orientation or class. Mediators handling fewer cases are more likely to give a kind of orientation to only one or both of the parties prior to beginning mediation. Of the mediators I spoke with, seven gave formal group orientations, one gave an orientation to both parents individually at least a day prior to mediation, one gave an orientation to both parents together at least a day prior to mediation, and one incorporated orientation information into the initial session. For the seven mediators who gave group orientations, the orientation was a separate event from the mediation, aside from the parties gaining information about expectations and procedure. No issues particular to a parent's case were discussed during the orientation process.

In other approaches the mediator might never talk to a party directly before having all the parties in the same room. However, in my study, eight of the mediators began with individual sessions with each client. A ninth mediator began individually if IPV was indicated. An individual session, like it sounds, is when a mediator speaks with one client privately for a time. In this case, it differs from shuttle mediation in that the mediator does not necessarily expect to continue moving back and forth. It might also be called a caucus or a private meeting if initiated during the mediation instead of before it.

One mediator I spoke with began with individual sessions if IPV was indicated by either party. Another mediator would, if IPV was indicated, have an individual session with just the survivor.<sup>12</sup> Generally, the mediators would spend fifteen to twenty minutes with each client, although one mediator said they routinely took an hour with each parent.

Mediators who did not always begin with individual sessions may have done additional screening over the phone so that they were already aware of sensitive issues and some of the relationship dynamic of the clients.

Beginning with individual sessions can serve a variety of purposes. Most commonly, it is the time for verbal screening, gathering agenda items, listening to client concerns, and outlining mediation rules and process. It is also the time the mediator gets to decide how to proceed. Immediately following the individual sessions, the mediator must decide if mediation should proceed, if the clients should be in different rooms, and what order to approach the issues. There is a great deal to do in a very short period of time.

### *Awareness of IPV Dynamics*

IPV can be an insidious thing. It is not always obvious to a person outside a relationship what behaviors are controlling, intimidating, or abusive. The literature and the mediators spoke a lot about subtle looks and small verbal jabs that might seem innocuous to any other person. Almost all of the mediators stated that the indication of IPV caused them to heighten their awareness of potentially abusive behaviors, but it can be difficult to recognize them when they happen. Several mediators noted that the best

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<sup>12</sup> This was an anomaly. I would expect most mediators to meet with both parties separately if IPV was mentioned by either party.

way to know what to look for is simply to ask the clients who are concerned. If one of the clients says they are afraid they might get intimidated into agreeing, a mediator can ask what that might look like and what the mediator can do to prevent such intimidation from happening.

Another important strategy is asking the parties questions about their conflict styles. One mediator suggested asking clients before mediation how they typically communicate. For some people, a little bit of intensity is okay, as long as it does not get out of hand. For others, even a slightly raised voice is intimidating. Clients might also have an idea of what issues in particular might become difficult. Knowing this can give a mediator an idea of how to approach sensitive topics.

### *Advocates and Support Persons*

Many of the mediators interviewed encouraged survivors of IPV to bring a support person to mediation. The role of this person can vary depending on the needs of the survivor and the mediator's preference. Several of the mediators I interviewed allowed a support person of some kind to be present during the mediation session. Rules regarding who can be present and their role varied from mediator to mediator and program to program. In general, there are three kinds of support persons who may be present: attorneys, domestic violence survivor advocates, and friends and family.

One mediator specifically prohibited attorneys during mediation, although she noted that there was nothing stopping a participant from consulting their attorney during breaks or between sessions. Two other mediators said that, while they would welcome attorneys, they had never had a client request to bring an attorney to mediation. One other

mediator said that they would allow attorneys to be present, but both sides had to have one to avoid a power imbalance. Several mediators mentioned that attorneys could be a hindrance when sitting in during mediation because of their tendency to focus on the way things might turn out in court. This might limit creativity and turn the focus from what works best for the children to what a judge would rule. To contrast this, one mediator found that having an attorney present was often very helpful for the participants if each side had one because they could act as a reality-check for participants who might be begrudging negotiators. All the mediators recommended that their clients consult with an attorney before signing a mediation agreement. The mediators saw this as a helpful safeguard. Clients were also encouraged to speak with an attorney if they were unsure about anything of a legal nature. In this way, mediators always encouraged the participation of attorneys. In particular, IPV survivors were encouraged to elicit legal support due to their potential vulnerability.

More common than attorneys were family members or friends. Domestic violence survivor advocates or shelter workers were also common for some mediators. Some mediators did not allow support people to be in the room while substantive issues were being discussed. Other mediators allowed this, but only if both parties agreed to it. Mediators who more regularly saw support people in mediation indicated that they were most common in shuttle mediation and that this mitigated a lot of protestations from the other client.

The use of advocates and support people for survivors of IPV<sup>13</sup> in mediation is a common suggestion in the literature (Field, 2004; Folburg, Milne, and Salem, 2004), but the mediators I spoke to indicated that, while not necessarily unwelcome, it is not a common feature of mediation. The involvement of attorneys is often cost-prohibitive for clients and in some ways eliminates the benefits of using mediation. All of the mediators did encourage clients to get outside legal support, just not during the actual mediation session. Advocates from domestic violence shelters and family members provided a different kind of support for clients. Most mediators were cautious to not involve advocates directly in the mediation of the issues. Their presence in the actual sessions was also sometimes problematic due to the complaints from the other party.

### *Deciding Not to Mediate*

When the specter of alleged IPV is hanging over a potential mediation a mediator must make a decision, whether the case is appropriate to mediate or that mediation will not exacerbate whatever issues are between two people. A lot of screening tools and literature exist to determine whether IPV has occurred and how serious it is but there is very little explanation in the literature as to how a mediator should use this information to decide when mediation is inappropriate (Ballard, Holtzworth-Munroe, Applegate, and Beck, 2011). It is not always realistic for mediators, especially those working in court-connected programs, to disallow anyone who has experienced IPV from mediation since

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<sup>13</sup> The other party would likely be afforded the same support if they asked for it. All parties were encouraged to seek outside legal support by all the mediators I spoke with. Although I did not ask the question directly, it seemed even less common for an alleged abuser to request a support person in mediation.

many people do not have more beneficial options. One mediator articulated a potential issue with denying mediation to those who may have experienced IPV:

What I'm hearing more and more frequently from clients is that their lawyers told them they better mediate anyway because it can affect how they're perceived in court. So even though there's a statutory and vocal exception it is at least the legal community's experience that sometimes DV survivors are perceived negatively if they try to opt out. So there's kind of a double bind there for our folks.

While all of the mediators emphasized that mediation is voluntary, many also acknowledged that there is usually some amount of systemic coercion involved. As a mediator pointed out above, what happens or does not happen in mediation has the potential to affect court outcomes, even though mediation is technically confidential. Furthermore, a potential client might feel even less safe going through an adversarial process. Choosing not to mediate because of the presence or history of IPV is usually intended to protect the survivor from violence or adverse outcomes but it also takes power away from the client. The mediator is taking the choice to mediate or not out of the hands of the individual and each mediator needs to weigh safety concerns and the survivor's ability to mediate against empowering the survivor to make informed choices about their own situation.

There are two major reasons to decide not to mediate before attempting a session: safety, and inability of one party to effectively advocate for themselves. The presence of

either of these things does not automatically disqualify someone, but if the problem is severe and unsolvable, then it might. Many of the strategies outlined in this thesis deal with one or both of these problems, but if a mediator thinks they cannot overcome the issue then they will likely decide not to mediate. As a practical matter, no mediator I talked to had really specific criteria for deciding not to mediate. Many of them relied on the information they had gathered during the screening process, but also on their intuition. This mediator described the process he goes through with a client to determine if he will mediate:

And getting a discussion going with the person who is, who I'm concerned about. I make the determination a lot. And I like to say, I don't want to say red flags, but just things that are there that a parent may say. They've been threatened by weapons. That's a high area of concern. So that concerns me a lot. They have had, they don't feel like they can say what they need to say. There's control. Usually a lot of times with the children involved. So, you know if I, you know, they've talked, they've figured some things out or there's a high level of conflict and the fighting and the manipulation is happening with the children. You can have the children if you do this. If you agree to this in mediation. If you drop the restraining order you can have the children. I'll agree to anything. Those kinds of comments those kinds of things would definitely by something that would make me consider not doing mediation.

This mediator looked for signs such as indicators of high danger like threats or actual use of a weapon, and for manipulative or coercive behavior that was likely to continue. However, he continued to say that he might still choose to mediate, albeit in separate sessions.

Determining that someone lacks the capacity to mediate due to ongoing IPV<sup>14</sup> is much more difficult than determining if mediation is unsafe. It seemed rare that a mediator would choose not to mediate for this reason. More often, they would give the clients a chance to mediate if they wanted to, employ whatever strategies they could to empower both parties, and then stop mediation if it was not going well. One mediator noted that client's concerns do not always mirror their behavior. The mediator said, for example:

We haven't done a formal study but through ten years of doing this I can tell you a lot of the times parents who tells me in the check in that this has happened a couple of times this week already, where a parent has come in and said the other parent is kind of a bully I just need you to know that and boom they're the ones who are much more aggressive in the mediation session.

Thus mediators may feel more accurate about their assessment of clients' relationship after having seen it for themselves. Even clients who are fearful or timid may be able to

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<sup>14</sup> The general concern is that the dynamics of the relationship, possibly related to past or current abuse, threats, or harm, are such that the survivor cannot adequately advocate for themselves or their children.



mediate given the right conditions, and clients who are confident during the screening may struggle face-to-face with the other party.

The lack of regimented decision making tools for deciding not to mediate was not necessarily a bad thing. The mediators seemed to have no problem making the decision on a case-by-case basis. In fact, many appreciated the flexibility. Furthermore, all mediators had the ability to terminate mediation after it began, so no one was particularly tied to their decision if the mediation did not go well.

## **During Mediation**

### *Ground Rules*

Ground rules were an expected part of all mediations for all the mediators I talked to. In every mediation, the mediators would lay out their expectations of the participants and the rules by which all parties were expected to abide. Mediators differed on whether a history of IPV would affect ground rules in any significant ways. Several mediators related some version of what this mediator said: “I have the same ground rules for all mediations basically in terms of respect and the language that you can use.” This mediator went on to describe the ways she might differ in enforcing the ground rules when IPV may have been involved, but she expected that rules themselves would be the same. I found that mediators made this distinction frequently. Although mediators might say that each party needs to be respectful and take turns speaking with every client, the level or swiftness of intervention might be different if IPV is involved.

One additional ground rule that was enforced by 30% of the mediators was, in the event that one party had a restraining order against the other, the restrained party had to

wait ten minutes before leaving at the end of mediation. This rule was mentioned previously as a safety measure, which it is. Some mediators also applied it as a ground rule. The distinction is important because mediators had different ways of eliciting agreement from the alleged batterer to stay the extra ten minutes. One apparently effective way to do so was to make it, as a ground rule, a condition for continuing mediation. The mediators who pursued this strategy typically felt that they could only do so when there was an existing restraining order. One mediator put it this way:

One of the ground rules is absolutely if there's an existing restraining order related to violence the offending parent or the respondent on the order has to wait ten minutes to leave. Whenever we finish up. And if they can't agree to that we don't do mediation. I might say you know I think it's probably going to be really important for you guys to leave separately. I'm going to need to get some agreement from you about that now if we're going to go forward. And I have almost never had a problem with a parent agreeing.

There is technically nothing stopping a mediator from enacting this rule as a ground rule even if there is no restraining order. Doing so, however, can make the waiting parent feel as though they are being accused of IPV, which is not beneficial for mediation, nor is it necessarily fair to that client.

In sum, there were not a lot of differences in general ground rules when IPV was a potential factor in mediation. Clients, as always, were expected to be

respectful, open, and engaged. 40% of the mediators said they are more likely to step in sooner and be more aware of the room dynamics. Behavior that might be borderline in mediation without IPV, cutting each other off occasionally, slightly raised voices, side comments, etc, would be clearly out of bounds if one parent had raised concerns. Mediators were also likely to tailor ground rules to the particular clients. This is true whether or not IPV was a factor. While mediators might not automatically enact extra ground rules, they might have a conversation with the clients about what they need to be successful in mediation. This could include extra ground rules if appropriate.

### *Caucusing*

All of the mediators indicated that checking in individually is a major intervention that they use when IPV dynamics might be at work. A caucus, or private session, is a temporary and private meeting with a client separate from the other client. Common practice is that the mediator takes approximately equal time with both parties in order to be non-biased, although this is at the mediator's discretion. Another common practice is that the mediator or either client is able to call for a caucus if they want one. It can be used as a break, a time for reflection or coaching, a de-escalation strategy, a time to speak frankly with a client, a time for the client to question the mediator, and many other things. Of the mediators I interviewed, all of them used caucusing to some extent, though the amount probably varied widely from person to person. Likewise, the amount a person caucuses depends a lot on the needs of the clients. One mediator gave this example:

I just had, just recently, one parent agree to most everything the other party agreed to after she told me initially she didn't want to agree to certain things. So I quickly, she was agreeing to joint legal custody when before she wanted sole. So when I heard her I just kind of got stunned a bit. I said oh let's hold that, wait a minute actually. I interrupted the conversation between the parents because she just slipped it out. And so I asked him to leave please. To go to the lobby. I'll check in with you in a few minutes I want to talk to each of you alone. And okay now where are you now. You said this before, where are you now? And we'll talk about that. And I might think she's doing it out of intimidation or just because she's so exhausted.

This is an example of one way that caucusing can be used. Parents might say one thing when with the mediator alone, and another when faced with the other client. A caucus allows the mediator to check-in with the client and determine if they are being intimidated, if they are able to think things through, and if the agreements that have been made are really good ideas. If pattern of submissive behavior becomes apparent, the mediator might need to separate the clients permanently or end mediation. Sometimes, though, a caucus is all that is needed.

If the concern was that a survivor was changing their mind about key issues, then the mediator could say, "is that what you really want? How is that going to work for your kids?" If the issue is that one client is yelling or name calling, or just being intimidating in general, the mediator could say "I notice that

you are raising your voice a lot and we agreed at the beginning not to do that. Do you think you can refrain in the future?” Caucusing allows the clients to save face and it also gives them space to say things to the mediator that they would not want to say in front of the other client. It also gives the mediator an opportunity to be more direct with each client.

### *Separating Clients*

At times, a mediator might decide that a temporary separation is not enough. In this case, they might choose to move from joint mediation sessions to shuttle mediation. This could be a sudden decision brought on by a dramatic escalation, or a carefully considered strategy discussed between mediation sessions. Many of the reasons for which mediators initiate a caucus can apply to decisions to completely discontinue joint sessions. For many mediators, separating clients was a way to continue mediation even within a context of substantial amount of acrimony.

The participating mediators mentioned several reasons why they might move from a joint session to separate rooms, but perhaps the most prominent was that one party seemed adversely affected by the dynamics of the joint mediation session. These could manifest themselves in a variety of ways. A party could shut down in mediation and stop talking or stop advocating for their point of view. Some clients could also begin agreeing to terms they were resolutely against previously. In this situation, the mediator might request a caucus and then ask questions of the client to determine if continuing a joint session is advisable. At this point, the mediators must proceed on the basis of what they have seen and the concerns of their client.

Another major reason that mediators separate clients is that one or both clients are unable or unwilling to follow the ground rules. Clients might be attacking, talking off topic, attempting to intimidate, or refusing to listen. If, after attempting to address the issues in a joint session, the mediator is unable to make progress, they might caucus and try to decide if and how mediation can continue. Sometimes the separation and a move to shuttle mediation is all that is needed. Other times, one party is too submissive or aggressive, or the parties are just too far apart to continue.

### *Verbal Interventions*

In prior sections, I have detailed a lot of the structural ways that mediators can affect mediation if IPV is a factor. These often take place before the mediation or with a lot of forethought. They also often involve a physical change to the mediation environment. However, mediators spend a great amount of time and energy using verbal interventions to change the complexion of the communication between the parties. Typically, the most drastic intervention a mediator can make is to separate the clients. Verbal interventions, while powerful, do not have the ability to provide for the physical safety of the clients. Commonly, verbal interventions were used more to ensure that both parties were thinking about the proposals thoroughly and to intervene before a situation escalated. For many mediators, these interventions were not exactly premeditated. A mediator might not consciously think, for example, “I’m going to reframe this negative language to prevent escalation.” For most mediators, verbal interventions were a fluid and natural part of mediation. In terms of IPV, mediators did not often feel that they did things differently, however, as with enforcing ground rules, many mediators thought

themselves likely to intervene more quickly if the clients had a history of IPV. A recurring comment was that mediators would step in and say something or caucus if they felt that a situation might escalate. If IPV was not a factor, the mediators might wait longer to see how the situation played out. The following are several verbal interventions that mediators might use in either joint or shuttle mediation.

### 1. Reality Checking

Reality checking is a line of questioning used to make sure that a client's proposals or expectations are reasonable for them. Mediators sometimes find that a client's position, that they should have the kids twelve out of fourteen overnights, for example, would not likely be successful in court and would not be healthy for the children. Though a mediator might feel this, they really have no way of knowing what is likely or healthy, and furthermore, are not in a position to tell their client what they think. Instead a mediator might ask a question like, "How do your kids do when they don't see the other parent for 11 days?" Or, "Do you think the other parent will agree to that? Why or why not?" The objective here is to help the client think through the proposals in a rational way and to think about what the children need and what the other parent's worst case scenario in court is. It could very well be that the client will answer the questions by saying, "My lawyer said the other parent would be lucky to get every other weekend because he/she has documented substance abuse problems and lives with roommates." For that parent, what they are asking for seems reasonable to them and their lawyer.

The mediators I talked to did not always have the same style when reality-checking and several mediators used different terminology when referring to the strategy.

The crux of it is asking questions of the clients to help them work through a proposal or stance. Sometimes, reality-checking is about helping a client be more specific about what they want. A mediator gave this example:

One parent might say I want my children safe. I want to know, clarify, what safe means. How will you know? How can the other person demonstrate that? Becomes very concrete and I like very detailed plans, parenting plans. Especially with higher conflict folks, with DV in particular.

## 2. Naming Problematic Behavior

For some mediators, simply putting a name on a kind of behavior is enough to put an end to it. One mediator gave this as an example:

I just call it for what it is in the room with both parents. I will confront a parent and say that's intimidating. ... Like the parent saying well, you know, wouldn't want to have to bring your sister to court, but you're contradicting what other people have witnessed. I'll cut that off and say look: mediation is not a rehearsal for court. When you guys go to court if you go to court you're both going to be armed for bear. And you're going to bring in your biggest weapons. That's the nature of the arena. But that's, there's no place for that in mediation. You're either going to work



together, and share your concerns respectfully or you know, we'll end it and you can, you can take each other to court. Telling the other parent what you're going to accuse them of in court is intimidating. So I'll call it.

The general idea is that if a mediator tells someone they are violating ground rules, they will stop. This can work for other things like name calling as well. This is one intervention, however, that not every mediator felt comfortable using. Some mediators felt that naming a problematic behavior in front of both clients had the potential to escalate the situation. As with any intervention, the mediator must assess the situation and determine if a given intervention would be helpful or not. Each mediator has their own style and for some mediators it is comfortable to name a problematic behavior, and for others it is not.

Some mediators found a middle ground by caucusing and naming a behavior in private instead of in front of both parties. This can help to save face if that is a concern for either party. It also gives the mediator more of a chance to talk the situation over with both parties. It could be that a client does not realize what they are doing is problematic. It might also be that the behavior is normal in each party's culture and not problematic at all.

### 3. Directing Conversation at the Mediator

Mediating in the same room is often faster and more effective than shuttle mediation. Mediators must often strike a balance between minimizing problematic behaviors and physical proximity. One mediator mentioned a strategy in which the mediator instructs

each client to speak to the mediator instead of each other while the other remains silent. This allows all the parties to listen to each other but can limit direct conversation between the clients. This can be effective if the clients seem unable to speak to each other without escalating their language and volume. Clients will often be unwilling to attack or intimidate a mediator in the same way they would the other party. This can also help the silent party to not feel directly attacked. Furthermore, if the mediator is the only conduit for conversation then the mediator is more likely to be able to effectively control the course of conversation.

Although this might be a good way to prevent overt attacks and conflict escalation it is important to note that clients may still be able to intimidate, belittle, and attack each other while talking to the mediator. As much of the literature suggests, controlling or violent behavior is not always overt. Many abusers are skilled at concealing their abuse from outsiders. Mediators must be on alert for signs of abuse and talk to the clients about their experience either in caucus or after the session.

#### 4. Checking-in With Clients

All of the mediators I interviewed cited checking in with clients or checking in individually with clients as one of the most important ways they mitigate the effects of IPV on mediation. Mediators went about checking-in in a variety of ways. First, mediators tended to check-in with clients at several different times including before mediation sessions, just after mediation sessions as the client is walking out, during caucuses, during joint sessions, during shuttle mediation, and over the phone or email between mediations. Second, check-ins could be about essentially anything pertaining to

mediation. In terms of IPV, the primary topics of check-ins were how the client felt during the process, what the client thought about agreements that were being made, and what the mediator can do in terms of the process.

Mediators, being in charge of the process, must keep themselves apprised of the feelings of both the clients throughout the whole mediation. Some people will say when they are feeling uncomfortable, or intimidated, or unsure, but others will keep silent. Similarly, some people may say that they are in agreement when really they are just ready to be done with mediation for the day. The mediators I spoke with constantly checked-in with clients whether or not things seemed to be going well. Frequently this was done individually and mediators would ask questions like, “How do you feel about the agreements?” and, “Is there anything I should do differently.” Although many mediators find this to be effective, it is not necessarily a cure-all. Not all clients will feel comfortable disclosing their true feelings to the mediator, especially if serious intimidation is happening. Additionally, it is probably very difficult for clients to tell a mediator to do something differently.

As mentioned, mediators had different ways of engaging in check-ins. One difficulty that some mediators encountered was that clients could be reluctant to initiate the check-in. Often, a client may want to speak with the mediator individually about something, but not want to initiate the meeting in front of the other parent. Some mediators would caucus when they instinctually felt that one client or the other needed a private session. Others would be sure to explain to both parties clearly that any person could call for a caucus at basically any time. Some mediators would tell each party individually that if they needed to caucus, they could just say they need a break and the mediator would take that as a

signal. In the same vein, one mediator suggested devising an innocuous safe word for a fearful client that the mediator could recognize as a signal to caucus. A few mediators made consistent practice of walking each client out individually at the end of a session so they had a little time to debrief with the mediator.

## 5. Balancing the Conversation

A particular situation sometimes arises in mediation in which one party consistently speaks first and the most often. The other party sometimes says nothing, or simply acquiesces to what the other person proposes. This is especially problematic in the context of IPV in in mediations since the deference of one party could be due to intimidation, fear, or residual trauma. In its worst form, the dominant party might talk over the other party or ignore what they say. This could be an intimidation tactic or an unintentional personality trait. Paradoxically, as some of the participating mediators noted, the party with the most IPV concerns sometimes dominates the conversation as well.. There are a few ways mediators told me they have handled this in joint sessions. One is to have the clients take turns speaking or proposing new ideas. If parents are working through a holiday visiting schedule, for example, one parent might propose the Thanksgiving schedule and the other parent propose the Christmas schedule, and so on and so forth. This kind of strategy allows the reticent party a turn for speaking, rather than having to interrupt or impose on the dominant party.

While taking turns might balance the number of times each party speaks, additional measures might need to be taken if one party is continually speaking for much longer periods of time. Giving a time limit is one way to do this, although this requires the

mediator to be continually focused on a clock. Another way is to limit the conversation topics each person can touch on. If a party is going off topic the mediator can cut in and remind them to stay focused.

## 6. Limiting Topics of Discussion

A frequent issue in cases involving IPV is the presence of a restraining order. Restraining orders are prohibited from being part of a custody or divorce mediation in Oregon, so as one mediator put it, she'll remind a party that "this [talking about a restraining order] is not going to get us where we need to go."

For some mediators it was more or less a ground rule that parties would refrain from discussing things not immediately pertaining to the mediation. This can work well if mediators make this clear early on and both parties buy-in. Sometimes, pertinent issues can be temporary roadblocks to any kind of productive mediation. If something like who gets legal custody of the children is proving to be an unremitting discussion the mediator could make the call to skip that issue, work on the others, and only come back to it if everything else had been discussed already.

## 7. Talking About Talking Outside of Mediation

This intervention, mentioned by only one mediator, is not intended to affect the current mediation, but to encourage a smooth transition into the next session. Parties in family mediation live in a variety of situations. Some clients are totally estranged from each other and might never communicate. Others see each other frequently, or might even live in the same house. Since the issues surrounding the children have the potential to be volatile, one mediator said they sometimes asked parents to agree to not talk about

the mediation issues outside of mediation. This is especially important when the parties have a history of violent encounters, as may be the case when one party is concerned about IPV. The mediator usually did this when parties were likely to be in close proximity to each other and had a history of discussing child issues in unproductive ways. The mediator felt that making an agreement before there was a problem empowered both parties to say no to talking about issues that might cause a problem outside of mediation.

### *Ending Mediation*

The last resort of any mediation is to simply end it prematurely. There are many reasons why mediators might choose to end a mediation. I asked the mediators I interviewed about issues specific to IPV that might cause them to end mediation prematurely. Not every mediator felt that there were things specific to cases involving IPV. 30% of the mediators said they had never really ended mediation because of IPV in particular, maybe because of something related, but not because of ongoing abusive or controlling behavior. One mediator offered an alternative reason for ending mediation:

That we're not moving toward the goal of coming to agreement for the children. Using the time there to get at each other or to continue fighting when it's not progressing forward. And the first thing you said, the parent not being able to speak up for themselves, [I] probably wouldn't end mediation because of that. Because if you end mediation and they're not

able to speak up for themselves, when they go on to court will they be able to speak up for themselves? With the other person in the room? So I try to give them every opportunity.

This mediator spoke on the difficulties in ending mediation prematurely. There is no guarantee that whatever comes after will be safer or more beneficial than mediation. She chose to end mediation when it became clear that no more progress was going to be made. IPV concerns can surely motivate this kind of intransigence, but other factors can as well.

Other mediators did look for particular signs and signals that mediation might become unsafe or unproductive due to the effects of IPV.

Well there's a few signs I look for, red flags that present themselves. One is um, you know, language that is intimidating or making ultimatums. You know, we tell parents in the orientation session that they need to make a good faith approach. Which means you entertain what the other parent's proposing. You discuss it. You don't come in, walk into mediation and say this is the plan, take it or leave it. You know, this is what I'm proposing, take it or leave it. If someone's presenting in that kind of a matter they're just not doing basic negotiating. They're not showing, demonstrating basic listening skills.

Overt intimidation was a major red flag, as was threatening language and behavior. Some mediators had even ended mediation because they were afraid that one party might attack the other one. The threat of imminent violence, though relatively rare for most mediators, will almost universally end mediation. This mediator also mentioned parties becoming so entrenched in their position that no discussion was possible. Similarly, a few mediators said that trying to negotiate changes to a restraining order was a major issue that often led to the end of mediation if it did not cease.

Another major issue that would lead to the end of mediation was simply a refusal to cease the kinds of intimidating or abusive behaviors that mediators have mentioned. This mediator illustrated the kind of process she would go through before deciding to end mediation:

I don't know that I have a clear guideline. It's if I can't stop you from acting abusively in the room we're not going to continue. The way I know I can stop you is if I ask you to stop and you stop then we're good. If I ask you to stop and you don't we probably don't have an agreement about the behavior here then we're probably going to end mediation. That would be my clearest way to say what the guideline is. And obviously there are times where I might not even pick up on it and the survivor says I'm not feeling safe. I want to stop. And that's it, we stop.

It should also not be forgotten that mediation is a voluntary process and if one party wants to stop mediating, then the mediator is obliged to do so. Mediation should be an



empowering process and so a mediator must allow an informed client to make those kinds of decisions for themselves.

## CHAPTER V

### DISCUSSION AND CONCLUSION

The results of this study point to a number of intersections between strategies proposed in the literature for working with clients who have experienced IPV and actual strategies as implemented by mediators. The prevalence of shuttle mediation and copious amounts of individual time is a notable facet of both proposed and actual strategies. Furthermore, the empowerment of clients to make their own decisions is consistent with the goals of fair mediation. Similarly, all mediators made accommodations for those affected by IPV and let clients determine their safety decisions rather than decide for them. Mediators were able to give additional support in the form of referrals to other professionals whose services might be appropriate in a given situation.

There were some significant deviations from some of the expected mediation strategies espoused by researchers. This particular sample of mediators took great care in their screening procedures. Within this group a lack of awareness of IPV was not an issue as some researchers reported in other populations (Beck, Walsh, Mechanic, and Taylor, 2010). Furthermore, I did not find some of the other issues with mediation that several researchers reported (Holtzworth-Munroe, 2011; Johnson, Saccuzzo, Koen, 2005). The mediators I interviewed acknowledged the presence of IPV and did not need to rely on documentation to make decisions about client safety.<sup>15</sup> Many of the mediators took safety precautions even when no abuse was apparent. Another major discrepancy was in the

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<sup>15</sup> Beck, Walsh, Mechanic, and Taylor (2010) in particular noted that the mediators in their study would frequently dismiss claims of IPV if they were not supported by some kind of documentation. While mediators in this study sometimes had documentation (mostly restraining orders, sometimes criminal charges) they did not require it in order to take steps to ensure the safety of their clients.

inclusion of support persons. While few of the mediators were opposed to the inclusion of support people in principle, few encountered requests for support people in practice. The presence of attorneys and advocates is a major safeguard against continued abuse in mediation that was not much used by the mediators in study (Field, 2004).

Taken together, the results of this study point to an emphasis on safety and cognizance of the particular needs of each client. Mediators focused a lot of attention on communicating with their clients about their needs surrounding safety and agency. There was no cure-all strategy that would eliminate the pernicious effects of IPV. However, mediators did boast a host of strategies that they had available in order to keep mediation safe and productive. Failing that, the mediators were aware that mediation is only one process for solving disputes, and that mediation might not be appropriate for all disputes.

## APPENDIX A

### QUESTIONNAIRE

Mediating With Clients Who Have a History of Intimate Partner Violence: Strategies and Intervention Techniques for Divorce, Child Custody, and Parenting Plan Disputes

Brian Law

Instructions: Please answer the following questions to the best of your ability. Many questions are related to mediation practices in child custody mediations. When you have completed the survey please return it to me at the beginning of our scheduled interview time. If you have completed the survey in electronic form please return to me via email prior to our scheduled interview time. While filling out this questionnaire please remember not to mention any information that might identify your clients or others involved in the mediation process. Thank you for taking the time to complete this survey.

1. What is your age? \_\_\_\_\_
2. What is your gender? \_\_\_\_\_
3. What is the highest level of education you have achieved?

High school diploma or G.E.D. / Some college/ Associate's Degree / Bachelor's Degree / J.D. / Master's Degree / PhD / Other

*If other please specify:* \_\_\_\_\_

4. How many years of experience do you have mediating divorce, parenting plan, or child custody cases? Round to the nearest year. \_\_\_\_\_
5. How many mediators work at your organization performing divorce, parenting plan, or child custody mediations? \_\_\_\_\_
6. How many divorce, parenting plan, or child custody cases do you mediate per year? Take into account even cases that were terminated before an agreement was reached. \_\_\_\_\_

7. Briefly, please describe any training you have had regarding mediating cases involving intimate partner violence. *Please respond to the question in the space provided below.*

8. Do you mediate cases in which the parties have a history of intimate partner violence? Intimate partner violence can be defined in this instance as physical, sexual, or psychological harm by a current or former partner or spouse,

*Please circle one:* Yes / No

9. Do you (or does your organization) screen for a history of intimate partner violence prior to meeting with either party?

Yes / No

10. If you answered “Yes” to the previous question, please describe the procedure that you use to screen parties for a history of intimate partner violence.

11. How often would you say you mediate by meeting with each party individually (shuttle mediation)?

*Please circle one:* Never / Almost Never / Sometimes / Almost Always / Always

12. When mediating between parties with a known history of intimate partner violence, how often would you say you mediate by meeting with each party individually (shuttle mediation)? If you do not mediate cases of this kind, please leave this question blank.

Never / Almost Never / Sometimes / Almost Always / Always

13. When you have prior knowledge of a history of intimate partner violence between the parties you are mediating how often are you concerned about the physical safety of either of the parties? If you do not mediate cases of this kind, please leave this question blank.

Never / Almost Never / Sometimes / Almost Always / Always

14. When you have prior knowledge of a history of intimate partner violence between the parties you are mediating how often are you concerned about the psychological safety of either of the parties? If you do not mediate cases of this kind, please leave this question blank.

Never / Almost Never / Sometimes / Almost Always / Always

15. When you have prior knowledge of a history of intimate partner violence between the parties you are mediating how often are you concerned about the emotional safety of either of the parties? If you do not mediate cases of this kind, please leave this question blank.

Never / Almost Never / Sometimes / Almost Always / Always

16. When you have prior knowledge of a history of intimate partner violence between the parties you are mediating how often do you feel this knowledge affects the

way you mediate? If you do not mediate cases of this kind, please leave this question blank.

Never / Almost Never / Sometimes / Almost Always / Always

17. Please describe the ways in which the prior knowledge of a history of intimate partner violence between the parties you are mediating affects the way you mediate. If you circled "Never" for question 16 please leave this question blank.

18. When you have prior knowledge of a history of intimate partner violence between the parties you are mediating what common issues relating to intimate partner violence do you look for (if any)?

19. Please describe how you address any issues that you identified in question 18.

20. How often would you say you discover a history of intimate partner violence between the parties you are mediating during mediation sessions, either in private or plenary sessions?

Never / Almost Never / Sometimes / Almost Always / Always

21. When the scenario described in question 20 occurs what is your usual recourse?

*Please circle one:* Continue mediation as normal / Terminate mediation / Other

22. If you circled “Other” for question 21 please describe your usual recourse when you discover a history of intimate partner violence between the parties you are mediating during the mediation session.



## APPENDIX B

### INTERVIEW QUESTIONS

#### Mediating With Clients Who Have a History of Intimate Partner Violence: Strategies and Intervention Techniques for Divorce, Child Custody, and Parenting Plan Disputes

Brian Law

The following is a basic list of questions you can expect to be asked during our interview. I may ask additional questions related to these questions for clarity. I am providing this in advance so that you are able to get a sense of my interests ahead of the interview. You do not need to do anything with these questions prior to the scheduled interview time. As a reminder, please remember not to mention any information that could identify your clients or others involved in the mediation process. Thank you for taking your time to participate in this study.

1. Can you tell me about your IPV screening procedure?
  - a. Is it verbal or written or both?
  - b. Does an indication of IPV trigger any kind of automatic response? (e.g. shuttle mediation)
2. When you have heard allegations of IPV do you begin mediation differently? How so?
3. How does the knowledge of IPV affect the way you approach mediation, if at all?
  - a. Do you employ extra ground rules?
  - b. Do you use a different model for mediation? (e.g. a more structured model) If so, how does the model differ from the one you usually use?
  - c. Do you ask questions that you might not normally ask?
4. Do you ever address allegations of IPV directly? If so, what strategies or techniques do you employ to do so?
  - a. How are these different than your normal strategies and techniques, if they are at all?
5. What strategies or interventions do you employ when you feel one party is unable to speak up for themselves?
6. What strategies or interventions do you employ when you feel one party is intimidating or attempting to intimidate the other?
7. What strategies or interventions do you employ when you feel one party is afraid of the other?
8. In what ways might you respond differently when a male is accusing a female if IPV versus a female accusing a male?
9. Have you ever ended mediation because of IPV? If so, please describe, in general terms, why you chose to do so.

- a. Do you have a generalizable guideline for knowing when to end mediation because of IPV? If so, what is it?

## APPENDIX C

### BIOGRAPHICAL INFORMATION OF PARTICIPANTS

Respondent	Age	Gender	Education Level	Experience	Size of Org	Cases per Year	Mediate With IPV?	Screen for IPV?
1	32	F	JD	1 year	4 people	240	Yes	Yes
2	62	M	JD MA PhD	20 years	3 people	180	Yes	Yes
3	37	F	Master's	2 years	3 people	30	Yes	Yes
4	52	F			1 person	12.-20.	Yes	No
5	48	F	Master's, Clinical License	10 years	5 people	100-150		
6	67	F	Master's	20 years	2 people	36-48	Yes	Yes
7		M			3 people		Yes	Yes
8	66	M	Master's	11 years	3 people	150-200	Yes	Yes
9	37	M	Master's	2 years	1 person	approx. 200	Yes	
10	62	F	JD MA PhD	14 years	1 person	20	yes	Yes

**Note:** Blank spaces indicate that the participant declined to answer that question.

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